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No. 03-1423

In The
Supreme Court of the United States

DARIN L. MUEHLER AND ROBERT BRILL,

Petitioners,

v.

IRIS MENA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*; and BRIEF *AMICUS CURIAE* OF POLICE OFFICERS RESEARCH ASSOCIATION OF CALIFORNIA LEGAL DEFENSE FUND AND AFFILIATES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITION

The Police Officers Research Association of California Legal Defense Fund (Fund) hereby respectfully moves for leave to file the attached brief *amicus curiae* in this case. Joining in this request are the following member affiliates of the Fund: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association. Also joining in this request are the following non-member affiliates of PORAC: National Association of Police Organizations, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs' Association. The consent of the attorney for the petitioners has been obtained. The consent of the attorney for the respondent was not obtained.

The interest of the Fund and its affiliates arises because the limited questioning of detained persons and the use of handcuffs to secure detained persons while executing a warrant to search for drugs in a residence are common practices of peace officers served by the Fund. The Fund is an organization providing prepaid group legal services to peace officers for matters related to their employment. The Fund and its affiliates serve peace officers throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, Oregon, Texas, Utah, Washington and Wyoming. Clear and consistent federal case law giving practical guidance to peace officers and their employers is necessary. Such guidance also serves to protect the safety of

peace officers, and to protect the interests of peace officers in fair and just employment-related discipline and potential civil liability.

In the instant case the Ninth Circuit Court of Appeals has rendered a decision that would substantially diminish the capacity of law enforcement officers to apply clear and workable rules under routine circumstances encountered during the execution of search warrants for contraband. The instant case would also substantially reduce the latitude law enforcement officers must have when determining the reasonableness of keeping a detained person handcuffed. It is believed that the brief *amicus curiae* will demonstrate the need for review of this case to ensure federal case law maintains the practical guidance and fair warning peace officers need to do their jobs lawfully. The analysis employed by the Ninth Circuit in this case departs from the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981), and demonstrates a developing split among the circuit courts concerning the proper use of handcuffs and the proper questioning of persons detained while executing a search warrant. The U.S. Supreme Court should reconcile this split in order to reestablish its guidance in *Summers*.

Respectfully submitted,

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STATEMENT OF INTEREST

Amicus Curiae represents the Police Officers Research Association of California Legal Defense Fund (Fund), its member affiliates: Peace Officers Research Association of California, Peace Officers Research Association of Nevada, Arizona Police Association, National Border Patrol Council, Operating Engineers Union Local No. 3, Colorado Police Protective Association, Montana Police Protective Association, Oregon State Police Officers Association, Oregon Council of Police Associations and Wyoming Highway Patrol Association; and its non-member affiliates: National Association of Police Organizations, Sacramento County Deputy Sheriffs Association and Riverside Sheriffs' Association. The Fund is an organization providing prepaid group legal services to peace officers and public safety employees for matters related to their employment.[1] The Fund provides services to peace officers and public safety employees throughout the western United States including the states of Arizona, California, Colorado, Montana, Nevada, Oregon, Texas, Utah, Washington and Wyoming. The Fund employs a panel of attorneys, such as Garrettson, Goldberg, Fenrich & Makler, P.C., which represents over 90 law enforcement unions throughout the states of Oregon and Washington.

Petitioners have consented to filing this brief. Respondent has not consented to filing this brief.

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[1] Counsel for a party did not author any part of this brief. The PORAC Legal Defense Fund made the entire and sole monetary contribution to preparation and submission of this brief.

The Fund supports the Petition for Writ of Certiorari. The decision in *Mena v. City of Simi Valley*, 332 F.3d 1255 (9th Cir. 2003) and the order denying rehearing en banc published at 354 F.3d 1015 (9th Cir. 2004) raise uncertainty concerning the conditions of detention of occupants during the execution of a warrant to search for contraband in routine circumstances. This decision will adversely affect the safety, the personal liability and employment relations of the members represented by the Fund and its affiliates.

SUMMARY OF ARGUMENT

Peace Officers have a strong interest in maintaining clear and consistent guidelines on the use of handcuffs on and the questioning of detained persons during execution of a search warrant in circumstances similar to those faced by Officers Muehler and Brill in *Mena*. It is not an uncommon practice for peace officers while executing a warrant to search for contraband in a residential building to secure the occupants, to handcuff them, to hold them in a central location during the search, and to question them. The Ninth Circuit decision in *Mena,* by treating handcuffing as an unusual case, departs from the guidance of the U.S. Supreme Court in *Michigan v. Summers,* 452 U.S. 692 (1981), substantially diminishes the capacity of law enforcement officers to apply clear and workable rules from the *Summers* decision in routine circumstances, and diminishes the latitude law enforcement officers need to make reasonable decisions on detention conditions. As Professor Wayne R. LaFave has pointed out, if ad hoc determinations dominate the execution of a search warrant, it is difficult to comprehend and apply relevant

factors correctly. The prospect for correct application, i.e., protecting liberty and privacy, are reduced. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e), pp. 649-650 (3d ed. 1996). Other circuit courts have adopted an approach that treats issues, such as handcuffing and interviewing detainees, as a condition of detention to be evaluated in the context of the *Summers* guidelines. This approach provides law enforcement officers clear and workable guidelines and sufficient latitude to carry out their duties while protecting the liberty and privacy of detainees. The Supreme Court should review the *Mena* decision to reconcile the conflict among the circuit courts and to reestablish the guidelines in the *Summers* case.

ARGUMENT

1. The Conditions of Detention in *Mena* Were Reasonable Under Existing Case Law.

In *Summers*, the U.S. Supreme Court established guidelines that allow law enforcement officers to adopt standardized procedures for the execution of warrants to search for contraband at residences and for the detention of occupants. The *Summers* decision did not address the use of handcuffs or the interview of detainees. However, the *Summers* decision did identify the general reasons for security concerns, and did recognize the need for law enforcement officers to maintain unquestioned control of the situation. *Michigan v. Summers,* 452 U.S. at 702-703. Law enforcement officers often consider the use of handcuffs for these reasons. Contrary to the *Mena* decision, other circuit courts have adopted an approach that applies the guidelines in the *Summers* decision in a clear and workable manner. The use of handcuffs does not need to

be a "heightened security measure" that makes handcuffing detainees an unusual case outside the scope of the *Summers* guidelines. *Mena v. City of Simi Valley,* 332 F.3d at 1263.

A. The Circumstances of the *Mena* Search.

The *Mena* search occurred in 1998. The facts are drawn from the Petition. Officers Muehler and Brill were investigating a gang-related drive-by shooting. One of the suspects was a gang member linked to a missing gun and known to have lived at the residence to be searched. The residence was a house that had been modified to accommodate separate living quarters for many persons. Gang members were known to live there. The residence was possibly a gang "safe house." The officers obtained a warrant to search the entire residential property for weapons and evidence of gang membership. Anticipating that gang members and weapons may be present, the residence was secured by a SWAT team. Four occupants were present, including plaintiff. All were first confronted by the officers with drawn weapons. The occupants were handcuffed and taken to a furnished garage where they were held in handcuffs until the search was completed in two or three hours. The search produced a gun, ammunition, drugs, baseball bats and gang paraphernalia.

Plaintiff was a young and apparently healthy woman of Hispanic appearance. She was confronted while she slept in her room. She was wearing a long-sleeved tee-shirt and sweatpants as pajamas. After she was taken to the garage she was given a jacket and shoes. She was allowed to move about the garage. The other detainees were there as well. Plaintiff never asked to have her

handcuffs loosened. Plaintiff and the other detainees were asked about their immigration status. One occupant was found to be an illegal alien. It was known that gang members and their affiliates were often illegal aliens. Plaintiff was also asked for documentation of her immigration status.

This case appears to be a routine search for contraband in which the law enforcement officers had reasonable concerns for safety and the destruction or hiding of contraband, and reason to believe that one or more occupants of the residence may be illegal aliens.

B. The *Summers* Guidance.

For over twenty years law enforcement officers have planned operations for the execution of search warrants using the guidance provided by the U.S. Supreme Court in the case of *Michigan v. Summers,* 452 U.S. 692 (1981). *Summers* provided clear and workable rules and reasonable latitude to allow law enforcement officers to judge their actions and for law enforcement agencies to establish policies for execution of search warrants for contraband, including " . . . the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.,* 452 U.S. at 705.

The *Summers* court identified legitimate reasons for detention of occupants of the premises to be searched, including to prevent flight, to minimize the risk of harm to officers, to prevent destruction or hiding of evidence, and to facilitate an orderly and complete search. *Id.,* 452 U.S. at 702-703. The *Summers* court limited the period of detention to the time it took to conduct a "proper search" for contraband. *Id.,* 452 U.S. at 705. In this regard, the

court was aware that a search could take several hours. *Id.*, 452 U.S. 711 (Stewart, J., dissenting).

The *Summers* court did not require evidence of a special danger to justify detention for safety reasons. The court said, "Although no special danger to the police is suggested by the evidence in this record, the execution of a warrant to search for narcotics is the kind of transaction that may give rise to sudden violence or frantic efforts to conceal or destroy evidence." *Id.*, 452 U.S. at 702. No particularized reasonable suspicion was required to detain an occupant.

Finally, the *Summers* court made it clear that the court was adopting a categorical and reasonable rule, not a method of ad hoc analysis, to guide detention: "The rule we adopt today does not depend upon such an ad hoc determination, because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure." *Id.*, 452 U.S. at 705, n. 19.

C. Search Procedures Similar to *Mena* Have Been Found Reasonable in Other Circuits.

Law enforcement agencies have used standardized procedures to develop plans for execution of search warrants. Handcuffing and questioning of detainees may be planned if known circumstances make these actions appear reasonable at the time planning is done. Cases from various jurisdictions indicated that this approach was and is acceptable. Courts have described the procedures used by police departments to execute warrants to search for drugs, all without criticizing the use of handcuffs *per se*. In *U.S. v. Fountain,* 2 F.3d 656 (6th Cir. 1993),

cert. denied, 510 U.S. 1014 (1993) the court held it reasonable and proportional for safety and evidence concerns to hold four men in a living room, handcuffed and lying on the floor while a warrant to search for drugs was conducted. In *People v. Ornelas,* 937 P.2d 867 (Colo. App. 1996) the court rejected an argument that the defendant was arrested as soon as he was handcuffed and relied on *Summers* to evaluate the reasonableness of the detention with handcuffs. In *Crosby v. Hare,* 932 F. Supp. 490 (W.D.N.Y. 1996), where the court held that absent special circumstances and without individualized suspicion it was reasonable for officers' safety that a naked woman (She was showering at the time police entered the premises.) be held first at gunpoint and then in handcuffs while officers conducted a security sweep of the residence before being allowed to dress and brought to the holding area in the residence.

At the time of the *Mena* search, even the Ninth Circuit had not considered handcuffing *per se* to be a unique issue. In *Franklin*, the Ninth Circuit did not criticize the plan of the Portland Police Bureau to pat, search and handcuff occupants of the residence and then detain them in a central location. Rather, the court found that the manner of detention was unjustified when an elderly disabled man, who was unable to walk or sit up without assistance because of multiple sclerosis, was kept in handcuffs that hurt him for a long period of time, wearing only a tee-shirt and with his genitals exposed to everyone in the living room where the detainees were kept. *Franklin v. Foxworth,* 31 F.3d 873, 876-878 (9th Cir. 1994). It was the pain, humiliation and indifference where circumstances clearly showed that no safety or security issue existed, not the handcuffs, that mattered. Not until

Meredith v. Erath, 342 F.3d 1057 (9th Cir. 2003), did the Ninth Circuit bring into question the reasonableness of detaining persons in handcuffs during execution of a warrant for search of evidence. *Id.,* 342 F.3d 1062.

2. Handcuffing as a "Heightened Security Measure."

In 1996, Professor Wayne R. LaFave noted that the use of handcuffs to secure detained occupants may affect the length of detention. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e) (3d ed. 1996). In the 2004 supplement Professor LaFave cited several cases from the Fifth and Ninth circuits, including *Mena v. City of Simi Valley,* 226 F.3d 1031 (9th Cir. 2000), which were contrary to decisions in the Second, Third and Sixth circuits. Professor LaFave spotted a trend that threatens to develop into a significant split among the circuit courts, depriving law enforcement officers of the clear guidance they need to carry out their duties without undue fear of civil liability.

The *Heitschmidt v. City of Houston,* 161 F.3d 834 (5th Cir. 1998) and *Franklin v. Foxworth,* 31 F.3d 873 (9th Cir. 1994) cases expressed concern with the manner detention was carried out and the circumstances that could make detention unreasonably intrusive and unjustified. Handcuffing was one of the circumstances causing concern to these courts. More critical were other circumstances indicating unnecessary and onerous conditions imposed on the detainees. In *Heitschmidt*, the detainee was required to sit on a bar stool for 4.5 hours while handcuffed. The warrant was issued to search for records of prostitution, not contraband. The police knew the detainee and expected him to be at his residence. They had no reason to consider him a suspect or to interfere with the search, pose

a safety threat, or to flee. Yet, the detainee was lured from his home on a police ruse, forcibly handcuffed, and brought back into his home. *Heitschmidt v. City of Houston, supra,* 161 F.3d at 838-839. In *Franklin*, an elderly, incontinent, seriously disabled man with multiple sclerosis, who could not walk or sit without assistance, was held for over two hours dressed only in a tee-shirt with his testicles exposed to men and women in the living room where detainees were brought. *Franklin v. Foxworth, supra,* 31 F.3d at 876-878. These cases may well fit into the limitation the *Summers* court expresses in its footnote stating that "special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case." 452 U.S. at 705, n. 21.

In *Mena*, the court held that " . . . because Mena was not a suspect, the police should not have subjected her to any of the heightened security measures police officers employ while detaining persons suspected of being violent criminals – such as physical roughness, threatening deadly force, and using handcuffs for an extended period." *Mena v. City of Simi Valley, supra,* 332 F.3d at 1263. For the first time, the Ninth Circuit identified handcuffs as a "heightened security measure." It appears that handcuffing of detainees is a special circumstance thus taking many searches out of the "routine case" category laid out by the *Summers* court.

The Ninth Circuit may have advanced the view that handcuffing *per se* is a unique case or circumstance requiring special justification in *Meredith v. Erath,* 342 F.3d 1057 (9th Cir. 2003). *Meredith* involved execution of a warrant by IRS agents to search for evidence of income tax code violations in a commercial building, not the search for contraband in a residence. However, agents discovered an

occupant on the third floor of the building, which agents did not know was used as a residence. The occupant was handcuffed and detained until the search was concluded. With this decision the Ninth Circuit announced that merely handcuffing a person and detaining her in handcuffs during a search for evidence was a violation of the Fourth Amendment, "absent justifiable circumstances." *Id.*, 342 F.3d at 1063. The court's ruling referred generally to execution of a search warrant for evidence and investigatory detentions. *Id.*, 342 F.3d at 1062. The Ninth Circuit also specifically noted that the *Summers* case did not involve handcuffing detainees. *Id.*, 342 F.3d at 1063.

The *Meredith* and *Mena* cases could be viewed as making handcuffing an unusual circumstance for which particularized suspicion against a detainee must first be established. Such an approach would make the standard procedures approach adopted in the *Summers* decision impractical in most cases, because law enforcement officers will not have the level of precise and particularized information necessary to plan for execution of a search warrant in a safe and effective manner. Law enforcement officers will be compelled to make most of their decisions in the field rather than adopting a reasonable, planned approach to detention decisions and adapting to circumstances found in the field based on the application of clear and workable guidelines.

It is difficult to consider handcuffing to be an unusual case *per se* when executing a warrant at a residence where police are searching for drugs or guns and expect gang members to be present. When planning the tactics for entry, officers must anticipate the risks identified in *Summers* (flight, destruction of evidence, safety, and interference with the search). It is necessary to maintain

control of the place and the occupants, whose cooperation and passivity cannot be assured. It may appear reasonable to detain occupants in handcuffs rather than depend upon other potentially more violent means of maintaining security. Any person who is not infirm and is in the milieu of guns, drugs and gangs, cannot be assumed to be harmless. Risk is inherent in the situation. As the court noted in *Michigan v. Summers,* 452 U.S. 692, 702-703 (1981), "The risk of harm to both the police and the occupants is minimized if the officers routinely exercise unquestioned command of the situation." So long as the search is carried out expeditiously and not prolonged for unrelated reasons, detaining occupants in handcuffs and questioning occupants may be prudent and reasonable, unless other egregious circumstances develop that clearly make the conditions of confinement unduly painful, humiliating, prolonged or unnecessary.

In other circuit courts handcuffing detainees is one of the conditions of detention to be evaluated according to the guidelines in *Summers*, and law enforcement officers are given reasonable latitude to make judgments on the scene and at the time of the search.

3. The Approach Followed by Other Circuits Is More Workable and Provides Greater Clarity.

The *Summers* decision has been justifiably praised. In his treatise, Professor Wayne R. LaFave praised the court's opting for a standardize procedure. He said:

> "This is because it reflects express recognition by the Court of the desirability of the standardized procedure alternative and also because it illustrates a very sound use of that approach. As

> pointed out elsewhere, standardized procedures are often to be preferred over ad hoc determinations because, in the long run, they will advance rather than reduce the protection of liberty and privacy. A legal principle which would produce the theoretically correct result 100% of the time but which is so difficult to comprehend and apply that at best it will be correctly used by the police only 75% of the time is not to be preferred over a standardized procedure which can be correctly applied in virtually all cases but which will produce the theoretically "correct" result only 95% of the time."

2 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 4.9(e), pp. 649-650 (3d ed. 1996).

Contrary to the Ninth Circuit, other circuits have followed the *Summers* guidelines, holding that law enforcement officers may detain and question occupants of a residence while executing a warrant in search of contraband, including the handcuffing of the occupants until the search is completed, absent special circumstances that may make the conditions of detention excessive or egregious. These circuit courts, as this court did in *Summers*, recognize that where drugs are present weapons are also likely to be present, and law enforcement officers must be given some latitude to maintain control of the search scene.

For example, in *Torres v. U.S.*, 200 F.3d 179 (3rd Cir. 1999), the court relied on *Summers* to hold that handcuffing detainees while searching a residence suspected as the site of a large cocaine distribution ring was reasonable and justified in the absence of special circumstances. *Id.*, 200 F.3d at 186. The court did not require law enforcement officers to specify facts pointing to particular individuals to

justify their actions. Indeed, police had mistakenly searched the wrong house. *Id.*, 200 F.3d at 182.

And, in *U.S. v. Fountain*, 2 F.3d 656 (6th Cir. 1993), the court found holding the occupants in handcuffs and lying on the floor during the search of a residence for drugs was reasonable. The court relied on *Summers*. Law enforcement officers had sufficient concern for their safety and to prevent disposal of contraband because they were searching in a confined and unfamiliar environment likely to be dangerous. The court found that the detainee's apparent voluntary connection with the house was sufficient to give law enforcement officers a reasonable suspicion of criminal activity and to detain him. *Id.*, 2 F.3d at 663. In this case, that included investigatory interviews of the detainees. The facts that the law enforcement officers had a search warrant, the house was known as a drug house, the detainee appeared to be more than a casual visitor and drugs and guns were found during the search, objectively justified the interviews. *Id.*, 2 F.3d at 665.

Finally, in *U.S. v. Childs*, 277 F.3d 947 (7th Cir. 2002), the court held that questioning of persons detained were not searches or seizures and need not be justified by law enforcement officers: "Questions asked during detention may affect the reasonableness of that detention (which *is* a seizure) to the extent that they prolong the custody, but questions that do not increase the length of detention (or extend it by only a brief time) do not make the custody itself unreasonable or require suppression of evidence found as a result of the answers." *Id.*, 277 F.3d at 949. The court pointed out that questioning of persons held in various detention settings, such as prisons or as passengers on public conveyances and venues, has commonly been held not to be a violation of the Fourth Amendment.

In this regard, the questioning need not be related to the reasons for the detention: "Questions that hold potential for detecting crime, yet create little or no inconvenience, do not turn reasonable detention into unreasonable detention. They do not signal or facilitate oppressive police tactics that may burden the public – for all suspects (even the guilty ones) may protect themselves fully by declining to answer. Nor do the questions forcibly invade any privacy interest or extract information without the suspects' consent." *Id.*, 277 F.3d at 954.

A sufficient number of cases have developed in other circuit courts to demonstrate that the standardized procedural approach set forth in the *Summers* decision is sound and can accommodate consideration of the conditions of confinement, including handcuffing detainees, without immediate resort to the "unusual case" exception. In some respects, the U.S. Supreme Court has created this circumstance by its footnote to its holding in *Summers*, which did not clarify or limit the "special circumstances" in the "unusual case." *Michigan v. Summers*, 452 U.S. at 705 n. 21.

CONCLUSION

This court should take this opportunity to reaffirm the standardized procedural approach adopted in *Summers,* and to establish that handcuffing detained persons occupying a residence during a search for contraband pursuant to a valid search warrant is not a special circumstance or unusual case *per se*. Rather, handcuffing, as all other conditions of detention, must be evaluated according to the guidelines in *Summers*. Law enforcement officers should

have latitude to handcuff occupants of a residence. As a matter of public policy, occupants and law enforcement officers will be better served by clear guidelines. Cases involving egregious circumstances, such as those found in the *Heitschmidt* and *Franklin* cases, will remain unusual cases where the guidelines of the *Summers* decisions have been clearly exceeded.

This approach is consistent with the purposes underlying the qualified immunity defense, which is intended to provide law enforcement officers with some reasonable margin for error so they may carry out their duties without undue fear of civil liability. *Saucier v. Katz*, 533 U.S. 194, 202 (2001).

For the reasons stated herein, the PORAC Legal Defense Fund and its affiliates respectfully request that the Petition for Writ of Certiorari be granted.

Respectfully submitted,

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